

United States Court of Appeals  
For the Ninth Circuit

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M. C. SCHAEFER,

*Appellant,*

vs.

SAM MACRI, DON MACRI, and JOE MACRI, W. R. McKELVEY and CONTINENTAL CASUALTY COMPANY, a Corporation,

*Appellees.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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**BRIEF OF APPELLEES**

**SAM MACRI, DON MACRI and JOE MACRI**

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FILED

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**STATEMENT OF THE CASE**

The appellant has filed three complaints herein. The first two were dismissed with leave to amend, and the third (Second Amended Complaint) was dismissed with prejudice. It is from the Order of dismissing this Second Amended Complaint that the appellant has appealed to this Court.

**SUMMARY OF ARGUMENT**

1. The Second Amended Complaint fails to state a claim against the Appellees Macri upon which relief can be granted.

(a) No overt acts in furtherance of the alleged conspiracy are pleaded which are unlawful.

(b) No specific or general unlawful agreement is pleaded. No time of agreement is alleged—no terms of the conspiracy are set forth.

(c) The alleged overt acts of the Appellees set forth are not sufficient to plead a conspiracy.

2. The action is barred by the Statute of Limitations.

3. If the Second Amended Complaint was to be dismissed because it fails to state a claim against the Appellees Macri upon which relief can be granted the dismissal with prejudice is proper for two reasons:

(a) The Appellant requested it.

(b) A Motion to dismiss a complaint with prejudice is well taken when the complaint shows that the plaintiff cannot state a cause of action.

**1. a. No Overt Acts in Furtherance of the Alleged Conspiracy Are Pleaded Which Are Unlawful.**

The first pertinent mention of the Macris in the Second Amended Complaint is in paragraph VI thereof, and is as follows (Tr. 370):

**“VI.**

“That defendants and each of them willfully, maliciously and with deliberate intent to injure, damage and defraud the plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree

to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following:

“(A) The defendants Macri in furtherance of said conspiracy willfully and intentionally failed and refused to do that portion of the work which under the terms of the agreement between the said Macris and the plaintiff were to be done by said Macris prior to the work to be done by plaintiff, namely: willfully failing and refusing to make the excavations in a proper manner, willfully failing and refusing to do the grading in a proper manner and willfully failing and refusing to furnish the kind, quantity and quality of lumber required to be furnished by them as a condition precedent to the performance of plaintiff's portion of the work, all designed and intended to and in fact causing plaintiff considerable unnecessary delay and greatly increased cost, and further, willfully and intentionally failing and refusing to make the payments required under said subcontract; all of which acts and omissions were continuous from the inception of work by the plaintiff to the end of the job, and although it was not known to plaintiff at the time of commission thereof, said acts were the acts not only of said defendants Macri but also their silent joint venturers Philp and Goerig and the said Continental Casualty Company.”

The preliminary matter in paragraph VI is all-inclusive and vague — a buckshot charge to the effect that all the Appellees conspired to injure the Appel-

lant. In subdivision A thereof the Appellant speaks of the Macris only in relation to the contract violations. Now the Appellant does not set forth any unlawful acts of the Macris in subdivision A. The District Court, Judge Driver sitting, found that the Macris had breached their contract with the Appellant, and awarded Appellant damages in the sum of \$56,764.97, together with costs and interests because the Macris did those acts recited by Appellant in subdiv. A. Those actions, although rendering the Macris liable in damages to the Appellant were never declared to be unlawful, nor is there anything unlawful about them from their very nature. Judge Driver told the Appellant (Tr. 339) "I thought it was a hard fought, close lawsuit in which I might just as well have found against you as for you, it was that close." Further, we notice, although it deals with the question of the Statute of Limitations, these acts set forth in subdiv. A. all took place before the start of the Yakima lawsuit which was filed December 20, 1945. (Tr. 380.)

The next alleged overt act in furtherance of the conspiracy is recited in subdiv. B. of paragraph VI of the Second Amended Complaint, and reads as follows: (Tr. 371)

"(B) On or about the 15th day of July, 1944, in furtherance of said conspiracy, defendants Philp and Goerig and said Macris entered into an alleged Agreement (copy attached as Exhibit B, and by this reference thereto made a part hereof, as though set out herein in full), terminating said joint venture agreement of December 11, 1943. Said alleged termination agreement was fictitious

and was executed solely to confuse the facts and deprive plaintiff of a cause of suit against Philp and Goerig.”

There was nothing unlawful in terminating this agreement. The Macris had the right to enter into it without the knowledge and consent of the Appellant, and had the right to terminate it without his knowledge and consent.

No further overt acts of the Appellee Macri are alleged until we come to subdiv. F. (Tr. 379) which reads:

“(F) In furtherance of the conspiracy, said defendants and each of them caused a suit to be filed in the Circuit Court of the State of Oregon for the County of Multnomah on the 14th of December, 1945, copy of the complaint and summons wherein are attached as Exhibit J, and by this reference made a part hereof as though set out herein in full, wherein the defendants Macri alleged that they had suffered damages in the amount of \$40,000.00 by virtue of plaintiff’s alleged breach of said second subcontract dated April 21, 1944, which said suit was malicious, willful abuse of legal process, was without any proper cause whatsoever, and was filed for the sole purpose of and in fact had the effect of drying up plaintiff’s credit, causing him severe damage to his business in Portland and reducing him to such an impecunious financial condition as to make it virtually impossible to continue the prosecution of the threatened suit in Yakima, Washington, and the filing of the suit in Oregon was possible only because of the omission of defendant McKelvy to terminate said second contract as heretofore alleged.”

The Appellant admitted to Judge Driver that there was a dispute between himself and the Macris (Tr. 340) and his complaints are replete with allegations to that effect. Certainly the Macris had as much right to institute an action against the Appellant as Appellant did six days later when he filed his action in Yakima. The starting of the law suit in Oregon was not an unlawful act, and since there was a dispute (which was eventually resolved in the Yakima case), was justified and was a lawful act. *Puget Sound Power & Light Co. v. Asia* (1921) 2 Fed.(2d) 491; *Abbott v. Throne* (1904) 34 Wash. 672, 76 Pac. 302, 65 LRA 826. Nor did filing such Oregon action "make it virtually impossible to continue the prosecution of the threatened suit in Yakima" as alleged, since it is also alleged that that action was filed six days after the Oregon action was filed. (Tr. 380.)

There are no further overt acts by the Macris alleged in the Second Amended Complaint unless one considers the actions of the Macris in defending themselves in the Yakima action from the Appellant, and their procedures in the appellate Courts. It is apparent that Appellant so considers them, but the law is to the contrary. *Puget Sound Power & Light v. Asia*, *supra*.

The net result of an examination of the Second Amended Complaint is that there is not one single act of the Macris which the Appellant has pleaded which is an unlawful act in furtherance of a conspiracy or otherwise.

**b. No Specific or General Unlawful Agreement Is Pleaded. No Time of Agreement Is Alleged — No Terms of the Conspiracy Are Set Forth.**

The Appellant relies on his general allegation in the preliminary portion of paragraph VI of his Second Amended Complaint to sustain his allegation of conspiracy. This writer has left the question as to what constitutes a conspiracy to his fellow counsel in the arguments in the lower Court, and will not prolong this brief by going into that subject save as it touches the acts of the Appellees Macri. At no time in his Complaint does the Appellant say when this conspiracy started or who started it. He does allege that the Macris didn't perform their contract with the Government in order to bankrupt him, but he never sets forth when and where the Macris and Continental Casualty Company and Mr. McKelvey ever met or discussed plans for his downfall or what those plans were. Appellant's contract with the Macris was signed on March 14, 1944 (Tr. 370). He fixes November 1, 1944, as the date on which Appellee McKelvey joined the conspiracy, not because Mr. McKelvey did anything on that date but because that was the date on which Appellant retained Mr. McKelvey (Tr. 372). Between those two dates, according to the Second Amended Complaint, the conspiracy was carried on by the Macris because they "willfully and intentionally failed and refused to do that portion of the work which under the terms of the agreement between the said Macris and the plaintiff were to be done by the said Macris" (Tr. 371). The other conspirators, except Mr. McKelvey, are made conspirators for that period by the allega-

tion that "said acts were the acts not only of said defendants Macri but also their silent joint venturers Philp and Goerig and the said Continental Casualty Co. (Tr. 371).

**c. The Alleged Overt Acts of the Appellants Set Forth Are Not Sufficient to Plead a Conspiracy.**

The Appellant argues backwards in his attempt to allege a conspiracy. His argument is that because each Appellee performed certain actions, therefore those actions arose out of a conspiracy and were the result of plans made by the conspirators. In other words, actions took place, so they must have been planned that way as the result of an agreement by all the Appellees to harm Appellant.

These actions of which the Appellant complains are more consistent with a lawful purpose than an unlawful one, and cannot be the basis of an allegation of a conspiracy. In *Dart v. McDonald* (1919) 107 Wash. 537, 182 Pac. 628 the Court said:

"It is true that it is not necessary, in order to establish the fraudulent conspiracy, that it be shown by direct evidence. It may be established by facts and circumstances; but, as above stated, these facts and circumstances must be inconsistent with an honest purpose and reasonably consistent with the intent to defraud."

Every allegation that is made in the Second Amended Complaint of any action of any defendant is of an action which is consistent with an honest purpose. Such being the case, the alleged overt actions of the various Appellees are not sufficient to sustain a pleading of conspiracy.

## 2. The Action Is Barred by the Statute of Limitations.

The Statutes of Limitations in the State of Washington which might apply to the allegations of the Second Amended Complaint are Sections 159 and 165 of Remington's Revised Statutes of Washington, and also now known as 4. 16.080 and 4. 16.130, respectively, of the Revised Code of Washington. For purposes of consistency with prior citations, we will refer to the Remington citations.

The applicable section of Rem. Rev. Stats. 159 is subdivision 4 which states that the Statute of Limitations for fraud actions is three years from the date of the discovery of the fraud by the aggrieved party. However, I do not think we need concern ourselves with that section because the Appellant in his brief on page 10 insists that this is a "civil conspiracy action." (He does say that the Supreme Court of the State of Washington has not passed on which of the two statutes applies, but if *Mitchell v. Greenough* (1938) 100 Fed.(2d) 184 is not decisive, it at least is most persuasive and a strong argument for the contention that the two year statute applies in the case of a conspiracy. That action was brought on the theory of a conspiracy. It was agreed by both parties that the two year statute applied. The unanimity of counsel on both sides, and the acceptance of their position by this Court, is most impelling.

When were the last unlawful acts of these alleged conspirators performed?

Whatever evil import the Appellant may give to

the actions of any of the Appellees prior to the time Continental Casualty Company gave notice of appeal to this Court (May 9, 1947) (Tr. 381) from the Judgment in the Yakima case, no reasonable contention can be made that any Appellee performed any unlawful act after that date. It is true that Appellant pleads that the appeal was taken; that Continental Casualty Company helped Macris perfect their appeal; that "three little words" were on the draft (although they were stricken before acceptance by Appellant); that Mr. McKelvey attempted to collect his bill — that these were all unlawful and thus overt acts in furtherance of the conspiracy, but I repeat no reasonable contention can be made to that effect.

This action was filed December 1, 1950 (Tr. 12), and the appeal in the Yakima case was taken May 9, 1947 (Tr. P381), which period of time is in excess of the time permitted by either Statute of Limitations.

**3. If the Second Amended Complaint should have been dismissed because it fails to state a claim against the Appellees Macri upon which relief can be granted the dismissal with prejudice is proper for two reasons:**

**A. The Appellant requested it (Tr. 610).**

**B. A Motion to dismiss a Complaint with prejudice is well taken when the Complaint shows that the plaintiff cannot state a cause of action.**

In *Foshee v. Daoust* (1950) CCA 5th Cir. 185 Fed. (2d) 23, the Court says:

"We need not cite or discuss cases relied upon by the plaintiff to the effect that in passing upon

a motion to dismiss the court will take as true all facts well pleaded and will not dismiss unless it appears that the plaintiff is not entitled to relief under any state of facts which could be proven. It is equally familiar doctrine that if it clearly appears from the complaint that on the facts pleaded the plaintiff will not be entitled to any relief, a motion to dismiss the claim is the proper procedure and should be sustained. Citing cases."

In *Gormaski v. Armour* (1948) 76 Fed. Supp. 752, the Court said:

"It does not appear from the averments of the complaint that the plaintiff can state a cause of action upon which he may hope to recover. This being true, it is the duty of the Court to sustain the Motion to Dismiss and this will be done."

The writer has sympathy for a citizen who cannot or will not have counsel represent him, but the writer also feels that the Appellant here has received more than his share of sympathy from the Bar and the Courts. The District Judges who have heard the arguments in this case, without exception, have been most kind and helpful to Appellant. They have made suggestions to guide him and have shown a great patience with him because he had no counsel. Their zealous efforts to keep pure the fount of Justice is commendable, and this Appellant cannot say that his rights were not protected and that he did not have his day in Court. However, Appellant has been unable to profit from the help given him because whatever cause of action he may have had against the Macris arising out of his dealings with them was ended and satisfied with the Judgment in the Yakima case. He never had any

cause of action against the Appellees McKelvey or the Continental Casualty Company, and if he ever did, his rights are barred by the Statute of Limitations.

Since it appears from the various complaints that Appellant cannot state a cause of action or claim, the dismissal with prejudice was proper, and the action of the lower Court should be sustained.

Respectfully submitted,

GRANVILLE EGAN

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